No. 373. 109.

Motion for certiorari.

Filed Nov 8, 1897.

Supreme Court of the United States.

No. 373.

EDWIN A. McINTIRE and MARTHA McINTIRE,
Appellants,
vs.
MARY C. PRYOR, *Appellee.*

On Appeal from the Court of Appeals of the District of Columbia.

Suggestion by appellee of a diminution of the record, and motion for an order upon the appellants requiring them to bring up the omitted portions thereof.

FRANKLIN H. MACKEY,
Solicitor for Appellee.

IN THE

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1. Now comes Mary C. Pryor, appellee herein by Franklin H. Mackey, her solicitor, and suggesting to the court that the transcript of the record as now brought into the Clerk's office of this court does not contain all the testimony and exhibits upon which this cause was argued and submitted to, and considered by, the Court of Appeals of the District of Columbia, but only a portion thereof, to wit, about one-half, moves the court for an order upon appellants to bring up the omitted portions thereof under the ruling in Railroad Co. *vs.* Shutte, 100 U. S., at page 647.

2. As grounds for the foregoing motion, appellee shows to the court here that a stipulation entered into by and between the respective parties to this cause, appears of record at folios 811–812 of said transcript in words and figures following to wit:

"It is mutually stipulated by and between the respective parties to this cause, by their respective solicitors, that the testimony and exhibits offered and filed in each of these cases, to wit, Pryor *vs.* McIntire, Equity No. 12761; Brown *vs.* McIntire, Equity No. 12977; Ackerman *vs.* McIntire, Equity No. 12978; Southey *vs.* McIntire, Equity No. 13034, and Hayne *vs.* McIntire, Equity No. 13177, in the Supreme Court of the District of Columbia, so far as the same may be relevant to the issues raised in this case of Pryor *vs.* McIntire (Equity No. 12761) in respect of Emma Taylor, Martha McIntire or Edwin A. McIntire *may be referred to and read at the hearing hereof with the same force and effect as if duly taken herein*, subject to all and any objections as to the materiality and competency thereof which could have been made if the same had been taken therein."

3. That the said stipulation was entered into by reason of the fact that the said five suits in equity had been brought against said E. A. McIntire and Martha McIntire to set aside certain conveyances in each of said cases on the ground of fraud, said fraud consisting in this, that the grantee in each of said conveyances was alleged to be one Emma Taylor, who was a fictitious person, and an invention of the defendants for the purpose of defrauding plaintiffs and that the subsequent deeds executed in her name to said Martha McIntire and E. A. McIntire were forgeries, and further that the alleged public sales claimed to have been made to her by said E. A. McIntire under deeds of trust to him never in fact took place, and further that said Martha McIntire the pretended purchaser of the real estate described in said deeds was a woman comparatively without means, that she paid nothing for said properties, and that she was a *mala fide* purchaser with full notice of the frauds of her brother the said E. A. McIntire.

4. By reason of the aforesaid circumstances and other allegations of like character in all of the said cases it was agreed between counsel for the respective parties that instead of repeating the examination of the witnesses in each of said five causes, their testimony as given in any one of said causes

together with the exhibits filed therein might be read in each of the other causes at the hearing, as appears by the stipulation above set forth. This was done to save the great expense and outlay of time which would have been required had the said testimony been repeated in each of said five cases.

5. That accordingly on the hearing in the Supreme Court of the District of Columbia sitting in equity, and also on the appeal to the Court of Appeals of the District of Columbia, the said causes were all heard together and the testimony and exhibits in each case was taken and considered as being a part of every other of said cases including the cause of Pryor *vs.* McIntire (now in this court as McIntire *vs.* Pryor). This will appear from the opinion of the said Court of Appeals, 7 Court of Appeals, D. C., 417, Pryor *vs.* McIntire, wherein the court said:

> "This is one of a series of five cases, argued and submitted at the same time, wherein different parties have sued the same defendants to cancel certain deeds and annul certain pretended sales of land, in the District of Columbia, claimed to have been made by Edwin A. McIntire, trustee, in violation of his obligations and duties as trustee in certain express trusts, and in pursuance of a scheme to defraud the makers and grantors therein. The other cases are No. 466, Brown *vs.* McIntire *et al*; No. 567, Ackerman *vs.* McIntire *et al*; No. 468, Southey *vs.* McIntire *et al*; and No. 469, Hayne *et al vs.* McIntire.
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> "*A considerable part of the testimony is common to all of the cases* and was taken in one [each] under a stipulation for its consideration in all."

And appellee further represents that the testimony in the other cases having been so, as aforesaid, considered by the court under the said stipulation of counsel, and the court having arrived at its conclusion and made its decree in this case on a consideration of all of said testimony and exhibits so, as aforesaid, taken and filed in all of said five cases, this court cannot properly consider this case of McIntire *vs.* Pryor unless the testimony and exhibits in the other four cases are also before

it, for to do otherwise would be to decide the case with the absence of a great deal of material and relevant testimony not before it but which however was before the court below and which entered into and controlled its judgment in the final disposition of this case.

And appellee further represents that the presence in this case of said testimony and exhibits, as found in said four cases, is necessary to a full and fair hearing of this case, the said testimony and exhibits consisting of the forged deeds and the evidence in respect thereof and the evidence of other frauds of like character committed at or about the same time in respect of like trust properties all bearing upon the question whether said alleged fictitious person, Emma Taylor, was really a fictitious person or not, and whether said E. A. McIntire and Martha McIntire are guilty of the frauds charged against them in the case at bar. That this court and other courts have frequently decided that such evidence is admissible. Thus in the case of Lincoln *vs.* Claflin, 7th Wall, p. 138, this court has said:

> "Where fraud in the purchase and sale of property is in issue, evidence of *other fraud of like character* committed by the same parties *at or near the same time* is admissible. Its admissibility is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in time the inference is reasonable that they proceed from the same motive."

And to the same effect is the language of this court in Castle *vs.* Bullard, 23 Howard, p. 186, where it was said:

> "Decided cases have established the doctrine that *cases of fraud* like the present are among the well recognized exceptions to the general rule that other wrongful acts of the defendant are not admissible in evidence on the trial of the particular charge immediately involved in the issue. *Similar fraudulent acts are admissible in cases of this description if committed at or about the same time*, and when the *same motive may reasonably be supposed to exist*, with a view to establish the intent of the defendant *in respect to the matters charged against him.*"

Again, the evidence in these other cases being relevant to this case, would have been taken and filed in this case but for the stipulation (above set forth) that the said testimony, as taken in the other cases, might be read on the hearing *as if it were taken in this case.* Much of the evidence in those cases is of a *circumstantial character* directly bearing upon the fraud alleged in this case and is the very kind of evidence usually resorted to to establish fraud. Said this court in the above cited case of Castle *vs.* Bullard :

> "Much of the evidence was of a circumstantial character, and it is not going too far to say that some of the circumstances adduced if taken separately might well have been excluded. Actions of this description, however, where fraud is the essence of the charge, *necessarily give rise to a wide range of investigation*, for the reason that the *intent* of the defendant is more or less involved in the issue * * * * Whenever the necessity arises for a resort to circumstantial evidence, *either from the nature of the inquiry or the failure of direct proof, objections to the testimony on the ground of irrelevancy are not favored* for the reason that the force and effect of circumstantial facts usually and almost necessarily depend *upon their connection with each other.*"

For the foregoing reasons the court below having considered all the circumstantial evidence found in said four cases as well as in this case, as by the stipulation of counsel, it had a right to do, came to the conclusion that said E. A. McIntire and Martha McIntire were guilty of fraud in the transaction complained of in the case at bar, and as to the said alleged Emma Taylor it found that :

> "There is no such personage as the Emma Taylor who figures in the transactions of this and the other cases as grantee and grantor in certain deeds and instruments of writing. *She is an invention of Edwin A. McIntire.*" Pryor *vs.* McIntire, 7 Ct. of Appeals D. C., 425.

From these conclusions and the consequent decree in this cause declaring said deeds null and void the said Edwin A.

and Martha McIntire have appealed to this court and now ask that the decree of the Court of Appeals be reviewed and reversed. They *have not, however, appealed the other cases* and therefore the record in those cases is not before this court. Yet it is manifestly necessary that before this court should consider this case it should have before it the same evidence *and all of it* which was before the court below and upon which its conclusions were made up and declared, to wit; the evidence and exhibits which includes the bills and answers in all five of the cases.

The question now arises whether the appellants may select only a part of the record upon which this case was heard in the court below and by bringing it here obtain a hearing of their appeal upon about one-half of the testimony and exhibits upon which that court made up its judgment herein. Shall they compel the appellee, who, the record now in this court shows, is a poor colored woman, a widow and earning her living by washing,* and who, as the court below found, the appellants have defrauded and impoverished, to bring up, at an expense to her of several hundred dollars, the omitted portions of the record in order to obtain a rehearing which she is not seeking, but which, if reheard at all should be properly reheard. We submit to the court that to allow such a practice would be to open the way by which future appellants may omit from the transcript such portions thereof as tells against them, and put the burden upon the winning side of advancing the costs necessary to bring up, by a writ of *certiori*, these omitted portions of the record which are in their favor. We submit we are not answered by saying that the appellants have given a bond for costs and we may at some time in the future recover

* "Mary C. Pryor and her husband were simple-minded colored people, and relied fully on the integrity of Edwin A. McIntire, whom they believed to be their friend. * * * *She was very poor*, and had but little intelligence. That she had perfect confidence in McIntire in the beginning is evident. She was kept in ignorance of the facts of the sale, and of the truth about the so-called Emma Taylor, and had no information with respect thereto until a short time before the institution of this suit." Pryor *vs.* McIntire, 7 Court of Appeals D. C., 425.

the comparatively large sum necessary for us to advance in order to put a record before this court which it was their duty, if they desire that decree reviewed, to have brought here in the first instance. The appellee, as we have shown, is poor and it would be a heavy and grievous burden upon her to require her to advance money which it it is the duty of the appellants to do. In Railroad Co. *vs.* Schutte, 100 U. S., p. 647, heretofore cited, the appellants in that case had brought to this court just such an insufficient record as the appellants here have brought and, the matter being brought to the attention of the court, Chief Justice Waite speaking for the court, said:

> "While we desire to encourage in every proper way all attempts made in good faith to exclude immaterial matter from transcripts brought here on appeals or writs of error, it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without regard to the wishes of his opponents or the rules and practice of the court. We therefore order,—
>
> "That the appellees file with the clerk of this court, and with the counsel for the appellant, on or before the first day of February next, a statement of the papers, documents and proofs used on the hearing below, and omitted in the transcript now on file, which they deem necessary for the proper presentation of the cause, and that unless the appellant shall, on or before the fifteenth day of March, file in this court as part of the record copies of such papers, duly certified by the clerk of the Circuit Court, or his deputy, under the seal of the court this appeal be dismissed.
>
> "If in this way unnecessary papers are brought up, we will, on application, make such order in respect to costs as may under the circumstances be proper."

We therefore respectfully submit that the appellee herein is entitled to the same relief against the appellants herein as was granted in the case above cited, and therefore we have made this motion.

Respectfully submitted,

FRANKLIN H. MACKEY,

Solicitor for Appellee.

FRANKLIN H. MACKEY, being duly sworn deposes and says that he is the solicitor of record for the appellee, Mary C. Pryor; that he knows the contents of the foregoing motion and that the facts stated therein upon his personal knowledge are true and those stated upon information and belief he believes to be true.

FRANKLIN H. MACKEY.

Subscribed and sworn to before me this.....day of November, A. D. 1897.

A. E. L. KEESE,
Notary Public, D. C.

[SEAL.]

IN THE

SUPREME COURT OF THE UNITED STATES.

EDWIN A. McINTIRE and MARTHA McINTIRE, *Appellants*, *vs.* MARY C. PRYOR, *Appellee.* } No. 373.

TO ENOCH TOTTEN, ESQ.,
Solicitor for Appellants.

Sir:—You will please take notice that on Monday, the 15th day of November, 1897, at the opening of the court or as soon thereafter as counsel can be heard, a motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said court thereon.

FRANKLIN H. MACKEY,
Solicitor for Appellee.

Service of the within motion and notice is hereby acknowledged this.....day of November, A. D. 1897.

ENOCH TOTTEN,
Solicitor for Appellants.